In the Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-862

ROBERT R. KRILICH, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

In this proceeding under 28 U.S.C. 2255, petitioner contends that his conviction for tax fraud should be vacated because, after his original appeal, the court of appeals held in another case that defendants in tax prosecutions are entitled under the Jencks Act to production of the summary of investigation written by an Internal Revenue Service Special Agent who testifies at trial.

In May 1971, after a bench trial in the United States District Court for the Northern District of Illinois, petitioner was convicted of willfully subscribing a false tax return for 1963, in violation of 26 U.S.C. 7206(1), and of attempting to evade tax, in violation of 26 U.S.C. 7201. He was sentenced to concurrent terms of eighteen months' imprisonment and fined $5,000. The court of appeals af-

firmed, holding, *inter alia*, that the district court had not erred in denying production of the Special Agent's summary of investigation that petitioner had sought under Rule 16(a)(1), Fed. R. Crim. P. The court noted in a footnote that the summary of investigation was not a statement producible under the Jencks Act either. 470 F.2d 341, 351 and n. 18 (C.A. 7). This Court denied certiorari. 411 U.S. 938.

After petitioner's conviction had been affirmed, the Seventh Circuit held, in *United States* v. *Cleveland*, 477 F.2d 310, that a Special Agent's summary of investigation is a "statement" producible under the Jencks Act; in so holding, the court expressly disapproved "the dictum in *United States* v. *Krilich*, 470 F.2d 341 (7th Cir. 1972) page 351 n. 18 * * *." 477 F.2d at 316, n. 10.

Petitioner then instituted this collateral proceeding under 28 U.S.C. 2255, requesting that his conviction be vacated on the ground that *Cleveland* should be applied retroactively to his prosecution. The district court denied the motion and the court of appeals affirmed (Pet. App. A, pp. A2, A3). The court of appeals noted that petitioner might not be entitled to relief even if *Cleveland* were to be given retroactive application (Pet. App. A, p. A5), but held that in any event *Cleveland* would not be applied retroactively to cases in which the judgment of conviction was entered before April 16, 1973, the date of the *Cleveland* decision (Pet. App. A, pp. A5-A12).[1]

The court of appeals correctly decided the question of retroactivity in a thoughtful opinion on which we rely. We briefly summarize that opinion here.

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[1]The court of appeals did not question petitioner's right to raise the issue of retroactivity in a collateral proceeding. Cf. *Davis* v. *United States*, 417 U.S. 333.

The court of appeals first determined that the change in the law of the circuit represented by *Cleveland* was not of a kind to require retroactive application. The effect of the producibiliity of the Special Agent's summary would not have been "to prevent a trial from taking place at all, rather than to prescribe procedural rules that govern the conduct of a trial." *Robinson* v. *Neil*, 409 U.S. 505, 509. Nor did the *Cleveland* decision raise "serious questions about the accuracy of guilty verdicts in past trials * * *." *Williams* v. *United States*, 401 U.S. 646, 653.

The court therefore applied the balancing tests of *Stovall* v. *Denno*, 388 U.S. 293, and *Johnson* v. *New Jersy*, 384 U.S. 719. The court concluded that *Cleveland* should not be given retroactive effect. The court determined that the procedures followed prior to *Cleveland* had not significantly impaired the integrity of the process of truth-determination; that the purpose of the *Cleveland* decision will be adequately served by prospective application; that the district courts in the circuit had properly relied upon prior Seventh Circuit decisions in denying production of Special Agent's summaries in the past; and that retroactive application of *Cleveland* would interfere with the sound administration of justice because retrial of petitioner and other persons similarly situated would in many cases be impracticable.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ROBERT H. BORK,
Solicitor General.

MARCH 1975.